

No. 86-629

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, *et al.*,
Petitioners,

v.

PACIFIC NORTHWEST ELECTRIC POWER AND
CONSERVATION PLANNING COUNCIL,
Respondent,
UNITED STATES OF AMERICA,
Intervenor-Respondent.

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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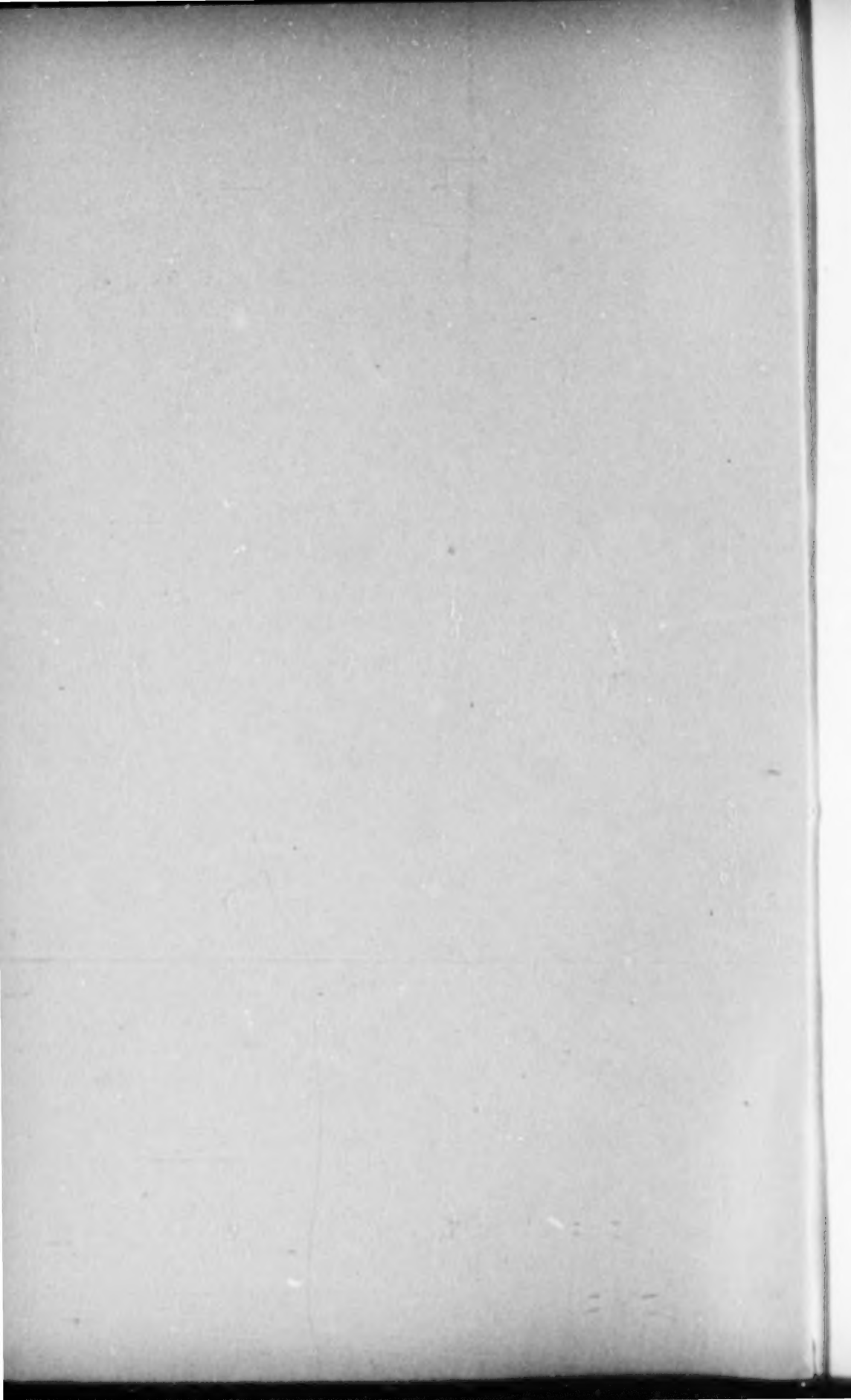


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INTEREST OF THE AMICUS CURIAE

The National Association of Home Builders represents 142,000 builder and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

For the reasons stated below, this case is of obvious and direct importance to both the home building industry and housing consumers.

The National Association of Home Builders has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners and has filed their letters of consent with the Clerk of this Court.

ARGUMENT

I. THIS CASE IS VITALLY IMPORTANT TO THE PEOPLE OF THE PACIFIC NORTHWEST AND, POTENTIALLY, TO EVERY PERSON IN THE UNITED STATES

A. The Pacific Northwest Power Planning Council's Actions Will Significantly and Adversely Affect the Costs of Housing and Electricity for Consumers in the Pacific Northwest

This case concerns the adoption by the Pacific Northwest Electric Power and Conservation Planning Council (the Council) of a Regional Electrical Power Plan (the Plan) for the states of Washington, Oregon

and Idaho, as well as parts of Montana, California, Nevada, Utah and Wyoming.¹ The Plan includes a set of Model Conservation Standards (MCS) that are the focal point of NAHB's concern in this matter. These standards will significantly affect the costs of housing in the areas covered by the Plan. The Council itself estimated that the MCS' space heating requirements alone will add \$1,900 to the cost of a single-family home west of the Cascades, and \$3,000 east of the Cascades. This comes to almost \$200 million in new single-family housing costs each year, or some \$3.35 billion during the plan's 17-year course. Pet. for Cert. 29, n.20.²

¹ The Council's jurisdiction is defined by Section 3(14) of the Pacific Northwest Electric Power Planning and Conservation Act (the Act), 16 U.S.C. § 839a(14).

² While the Petition for Certiorari concedes for the sake of argument the correctness of the Council's figures, the home building industry does not in fact agree. The Council developed alternative packages of conservation measures it believed would meet its 4¢/kwh conservation standard. Plan Vol. II, Tables J6-1a to J6-1c. For the package of conservation measures labeled "Type A" in Table J6-1a, in the Council's 1,350 square foot prototype single-family house built west of the Cascade Mountains, the Council estimates increased space heating conservation costs of approximately \$1,900 in 1980 dollars. See Plan Vol. II, Tables J6-1a, K-14 & K-15.

However, the Pacific Power & Light Company's estimate was approximately \$2,800 to \$4,500; the Puget Sound Power & Light Company's estimate was approximately \$3,800, the Seattle Master Builders Association's estimate was approximately \$4,800, the NAHB's estimate was approximately \$4,900 and Breeden Bros. Inc.'s estimate was approximately \$7,100. Official Record of the Northwest Power Planning Council Docs. 311/01002, 311/00989, 321/02310 (Enclosure 6), 311/03445 & 321/02392, re-

This is a case of a governmental body of questionable authority promulgating ill-conceived and illegal standards. Although the Court should answer the significant federal question of whether the Council is a valid interstate compact or a federal agency,³ the Court should also rule that the Council's Plan is defective and that it must be reconsidered by a properly constituted Council and brought into compliance with Congressional intent regarding economic feasibility for the consumer. *See* Pet. for Cert. 24-30.

B. What Has Happened in the Pacific Northwest Could Happen Elsewhere in the United States

During each of the last two Congresses, bills have been introduced that would authorize the formation of interstate compact agencies similar to the council. H.R. Bill 3074, 99th Cong., 1st Sess. (July 24, 1985); H.R. Bill 5766, 98th Cong., 2nd Sess. (May 31, 1984). Under these bills, compact agency members would be

spectively.

The Plan shows increased costs of approximately \$3,000 for "Type A" conservation in the Council's prototype home east of the Cascade Mountains in Oregon, Washington, Idaho and Montana, where the climate is more severe. *See* Plan Vol. II, Tables J6-1b, J6-1c, K-14 & K-15. The NAHB's estimate for such a home was between approximately \$7,800 and approximately \$8,200. Official Record of the Northwest Power Planning Council Doc. 311/03445.

The NAHB has been unable to determine the Council's per unit estimate of increased costs of multi-family housing. The Seattle Master Builders Association estimated that the increased cost west of the Cascade Mountains would be approximately \$3,500. Official Record of the Northwest Power Planning Council Doc. 321/02310 (Enclosure 6).

³ *See* Pet. for Cert. 11-20.

appointed by the States and exercise control over a federal agency. H.R. Bill 3074 §§ 103(3), 106(e)(2); H.R. Bill 5766 §§ 103(3), 106(e)(2). These bills would allow the state-appointed agency to apply to the Federal Energy Regulatory Commission (FERC) for an order compelling electric utilities to provide or modify transmission services. H.R. Bill 3074 § 106(e)(1); H.R. Bill 5766 § 106(e)(1). FERC would be compelled to issue the proposed order except in very limited circumstances:

Upon receipt of an application under this subsection, and after public notice and notice to each affected electric utility and opportunity for an evidentiary hearing, the Commission *shall issue such order* unless the Commission finds that the order would unreasonably impair the reliability of an electric utility affected by the order or would impair the ability of such an electric utility to render adequate service to its customers or consumers.

H.R. Bill 3074 § 106(e)(2) (emphasis added); H.R. Bill 5766 § 106(e)(2) (emphasis added).

The Petition for Certiorari discusses at length the significant constitutional issues raised by state appointment of a body which exercises control over a federal agency. Pet. for Cert. 11-20. The above-quoted provision of the proposed bills demonstrates the prospect of continuing and expanding this type of regional government throughout the United States. *See also* 33 U.S.C. § 1508(b)(1) (Deep Water Ports Act) (state governor veto over port location approved by the Secretary of Transportation).

The significance of the two bills' similarity to the Act is this: as future interstate compact agencies are formed, the outcome of this case could become precedent affecting every person in the United States who uses electricity, builds homes, sells building supplies, or will buy or live in a new home—i.e., literally everyone in the United States. Now is the time to insure that the correct precedent is set, before other agencies are created and have acted.

C. The Council's Conservation Standards Will Have a Tremendous Impact on the Cost and Affordability of Housing if Adopted Nationwide

While the Petition for Certiorari explains the regional effect of the Council's conservation standards, Pet. for Cert. 29-30 & nn. 19-23, it does not describe the potential effect throughout the rest of the nation. Approximately 1,742,000 privately owned housing units were started in the U.S. in 1985. U.S. Department of Commerce, Bureau of the Census, *Construction Reports, Housing Starts*, Table 7 (August 1986). The value of new housing units put in place by the private sector in the United States in 1985 was \$115,974,000,000. *United States Department of Commerce News*, Bureau of the Census, Table 1 (October 1, 1986). Even an increase of just \$1,900 per unit, the Council's estimate in 1980 dollars of the cost of their conservation standards in single-family homes in a moderate climate (Plan Vol. II, Tables J6-1a, K-14 and K-15) would add \$3,309,800,000 to the annual cost of privately owned housing nationwide. If NAHB's estimate of \$4,900 is used, the total annual added cost would be \$8,535,800,000 nationwide. Official Record of the Northwest Power Planning Council, Doc. 311/03445. This has definite effects on the

housing consumer. If only \$1,000 is added to the mortgage amount for an average priced, new single-family home, at a 10% interest rate for a 30-year loan, *then the number of American families who can afford the average priced home drops by 1.6%, or 325,000 families.* NAHB Economics, Mortgage Finance and Housing Policy Division. The potential nationwide impact on the ability of people to afford homes is dramatic.

The construction industry as a whole employed 4,687,000 people in 1985. U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Table B-1 (September 1986). While the exact number employed by the housing industry is not available, a rough estimate of the magnitude is possible in light of the fact that private construction of new housing units accounted for 33% of the total construction in the United States in 1985. *United States Department of Commerce News*, Bureau of the Census, Table 1 (October 1, 1986). A shrinking housing market, which would be caused by any increase in housing costs, would seriously affect the economy in general and employment in particular.

II. THE NINTH CIRCUIT VIOLATED SUPREME COURT PRECEDENT IN DEFERRING TO THE POST-HOC INTERPRETATION OF THE ACT BY THE COUNCIL'S ATTORNEYS

The Petition for Certiorari discusses the Council's substitution of its interpretation of the Act for the intent of Congress, and the Ninth Circuit's incorrect deference thereto. Pet. for Cert. 24-30. NAHB submits that there are other important reasons why the Ninth Circuit should not have sustained the Council's actions. The Council failed to explain why it acted

contrary to its earlier interpretation of the Act's requirement that the Model Conservation Standards be "economically feasible for consumers." In sustaining the Council's actions, the Ninth Circuit erroneously deferred to the *post hoc* rationalizations of the Council's attorneys, rather than the record before the Council.

Until the petitioners filed this case, the Council's interpretation of "economically feasible for consumers" agreed with the intent of Congress.⁴ Specifically, the Council indicated early and repeatedly that it interpreted the Act to require that no cost-effective conservation measure with a marginal cost greater than the average cost electric rate may be required by the Plan unless the buyers of new homes are reimbursed for the difference in cost.

By way of background, at the seventh of the forty-three Council meetings leading to adoption of the Plan, representatives of the Seattle Master Builders Association (the Master Builders) expressed concern that the Council would require marginal cost conservation in new housing without reimbursing new home buyers for the difference between the cost of the marginal cost conservation measures and average cost electric rates. Mtg. 7, T. at 1a-14 to 15, 1b-4 to 1b-9 (July 13, 1981) (contained in Pet. for Cert. App. X). The Council members were fully aware of their statutory duty to provide such reimbursement. Indeed, the Council members became somewhat impatient with the Master Builders' implication that the

⁴The intent of Congress is explained in the Petition for Certiorari at 24-27.

Council might not do as the Act requires. *See* Mtg. 7, T. at 1a-14 and 15, 1b-4 to 1b-9.

Additionally, at the thirty-sixth Council meeting, all eight members of the Council formally voted to adopt a position that reimbursement must be offered to consumers to achieve standards set at a marginal resource cost level. Mtg. 36, M. at 1, 4 (December 28, 1982) (contained in Pet. for Cert. Appx. W at W-3 to W-4, adopting Staff Recommendation 3 of the Official Record of the Power Council, Doc. 440/01494, contained in Pet. for Cert. App. V at V-4 to V-7).

The Council knew that the Act does not allow it to require new housing conservation measures based upon the region's marginal cost without reimbursing consumers for the difference between that cost level and average cost electric rates. However, that is precisely what the Council did. The Plan set a marginal cost standard for conservation in new housing (Plan Vol. I, 7-1, 10-4, 10-9 to 10-11), but after December 31, 1985, the Plan provides no reimbursement to consumers for the difference between the marginal cost of new housing conservation measures and average cost electric rates. Plan Vol. I, 10-9 to 10-11.

Contrary to the contention of the Ninth Circuit, the statutory interpretation to which it deferred was not the Council's but the interpretation of the Council's *attorneys*. Neither the Council's actions nor the record offer any explanation of why the Council chose to act contrary to its previously adopted interpretation. Neither the Council's actions nor the record contain any supporting analysis for this action. Indeed, *there is no indication that the Council was even aware that it was acting contrary to its own adopted interpretation.*

It was only after the Council's action that an explanation finally emerged in the legal brief of its attorneys. This came in the Council's Reply Brief at 54-57, which was not filed until December 1984.⁵ The Ninth Circuit attempts to justify its position as a valid deference to agency interpretation of its statute: "Petitioners have not shown the Council's definition of economic feasibility to be unreasonable." *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1369 (9th Cir. 1986). However, the cases cited by the Ninth Circuit are totally inapposite because, here, *the interpretation was not the agency's*.⁶ This Court has drawn a hard line between interpretations of administrative agencies, to which it has granted some deference, and *post hoc* explanations by agency attorneys, which the Court has rejected:

⁵ The Council record closed in April 1983.

⁶ The Ninth Circuit cited the following cases to justify the deference it granted to the interpretation. 786 F.2d at 1366-67. The cases put the burden on the petitioners to prove the interpretation is not reasonable. *American Paper Inst., Inc. v. American Elec. Power Service Corp.*, 461 U.S. 402, 422-23 (1983), quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *ALCOA v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984); *Dept. of Water & Power v. Bonneville Power Administration*, 759 F.2d 684, 690-91 (9th Cir. 1985); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 673 F.2d 1076, 1078, *as amended*, 686 F.2d 708, 710-11 (9th Cir. 1982), *rev'd on other grounds*, 467 U.S. 380 (1984); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 599-600 (9th Cir. 1981), and cases cited therein.

The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

"[A] simple but fundamental rule of administrative law * * * is * * * that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action * * *." *Ibid.*

For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate, (see *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197), the administrative process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S. at 196.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

The Council's failure to explain why it changed course and acted contrary to its own interpretation

of the Act violates the requirement that an agency articulate a satisfactory explanation for its actions. In *Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), a group of insurance companies challenged the legality of the National Highway Traffic Safety Administration's (NHTSA) decision to rescind its requirement that automobile manufacturers install "passive restraints," such as airbags. *Id.* at 35-38, 40. The rescission was invalid because NHTSA "failed to present an adequate basis and explanation" for its action. *Id.* at 34. This Court criticized the adequacy of the agency's explanation of its decision to rescind one portion of the passive restraints requirement, and criticized the agency's failure to give any explanation for its decision to rescind another portion. *Id.* at 49-50, 52-57. NHTSA had at least the same obligation to explain its decision to change course and rescind a proposed action as it did to explain a proposed action to begin with. *Id.* at 42-43.

The same principle should be applied in the present case. The Council should have at least told the public why it was no longer going to do something it previously had acknowledged was required under its statutory mandate, and given the public the opportunity to respond in a meaningful way prior to the change.

Administrative agencies must be held accountable for their actions. They must abide by the standards set by Congress, Pet. for Cert. 27, 28-29, and they must abide by their own standards and the record before them. Only when they have given notice of the proposal to change their standards, given the public an opportunity to be heard, and filed in the official record an analysis and explanation of the changes,

should they be allowed to make them, and then only if they conform to the will of Congress. To do otherwise is to act arbitrarily and capriciously.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court should issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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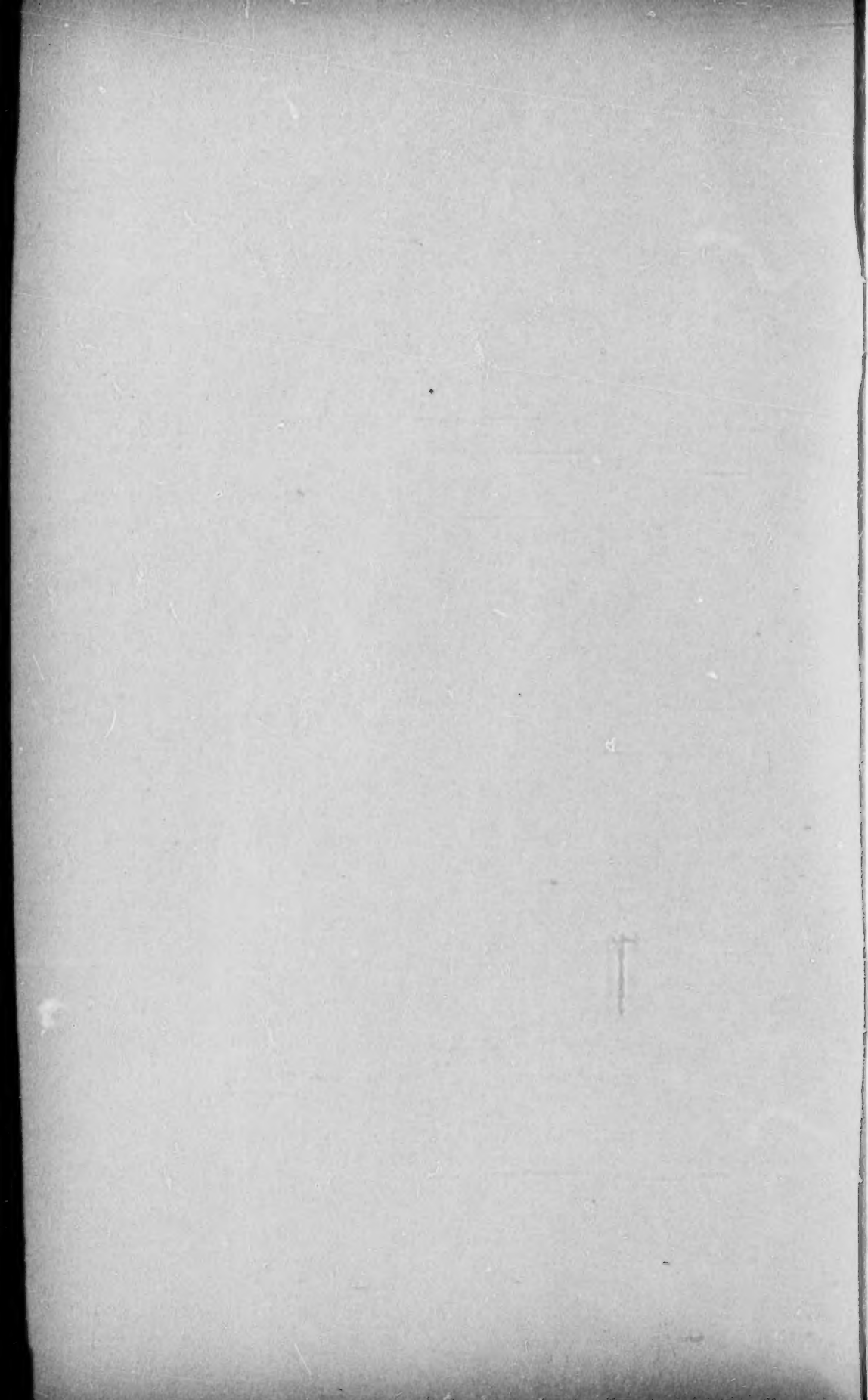


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**BRIEF AMICUS CURIAE OF
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INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Seattle Master Builders' petition for writ of certiorari. Consent for filing this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt public interest organization with over 19,000 contributors and supporters located throughout the country.

PLF's principal office is located in Sacramento, California, and PLF has liaison offices in Seattle, Washington, and Anchorage, Alaska.

Since its establishment in 1973, PLF has actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with public interest issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of not only the benefits, but also the social and economic costs involved. PLF has stressed this approach in the area of land use and environmental regulation.

In addition, PLF believes that governmental decisions must be made pursuant to law and that the authority to make such decisions must not be exercised in contravention of constitutional and statutory proscriptions. It has therefore been the policy and practice of PLF to protect individual liberties and personal property rights against excessive or illegal government conduct.

All citizens of the Pacific Northwest, a number of whom are PLF contributors and supporters, will be significantly impacted by the decisions of the Northwest Electric Power and Conservation Planning Council (Council). These decisions will result in far-reaching economic and social impacts and will also significantly affect the quality of the environment. The power to so substantially impact the lives of many must be exercised in accordance with the law.

PLF submits this *amicus curiae* brief in order to demonstrate that the Council is exercising its power

illegally by violating important principles of the environmental laws of this land.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 786 F.2d 1359 (1986) and appears in Appendix A to the petition for writ of certiorari.

STATEMENT OF THE CASE

Amicus curiae adopts petitioners' statement of the case found at Page Nos. 4 through 10 of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Northwest Power Planning Council members are authorized pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Act), Pub. L. No. 96-501, 94 Stat. 2697 (1980), 16 U.S.C. § 839, to draft a comprehensive Northwest Conservation and Electric Power Plan (Plan). The Plan is to be implemented by the Bonneville Power Administration (BPA) for the entire Pacific Northwest region. In drafting and enforcing the Plan, the Council has considerable control over the conduct of BPA because BPA is directed under the Act to pursue only those actions which are consistent with the Plan.

The Plan was promulgated by the Council and will direct BPA's energy conservation and development program over the next 20 years. This program includes numerous actions which will significantly affect the quality

of the human environment. Under these circumstances, both state and federal environmental disclosure statutes require preparation of an environmental impact statement (EIS) to ensure that a full disclosure of environmental information is available for proper consideration during decision making. Nevertheless, no EIS was prepared and the Ninth Circuit sanctioned the omission by ruling that neither state nor federal law required preparation of an EIS. In so ruling, the court misinterpreted state and federal statutes and placed the Ninth Circuit 180° out of step with other federal circuits.

I

THE NINTH CIRCUIT HAS CREATED A GIANT LOOPHOLE IN ENVIRONMENTAL PROTECTION WHICH WILL LEAD TO AVOIDANCE OF ENVIRONMENTAL LAWS

In response to the Council's claim that it need not comply with either the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, or state environmental protection statutes in preparing the Northwest Conservation and Electric Power Plan, the Ninth Circuit created a giant loophole in the laws of environmental protection. The court so ruled despite the uncontroverted facts that the Council's actions may significantly affect the environment. Among those facts are:

1. The Council's Plan constitutes the primary "strategy" for meeting all of the "electrical energy needs" of the entire Pacific Northwest Region¹ for the next 20 years. Plan Vol. I at iii.

¹ The Pacific Northwest region is the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, (continued)

2. The Plan calls for a demand of between 17,834 and 26,245 megawatts of electricity by the year 2002 which will require a combination of conservation to reduce the need for electricity and new electrical generation resources.²

3. Among the specific actions identified to be taken are: (a) directing BPA to acquire between 1,000 and 11,000 megawatts of electric energy resources throughout the region, Plan Vol. I, Figure Nos. 5-1 to 5-4; and (b) imposition of a mandatory conservation program as part of the Council's two-year action plan which includes measures in the residential sector to weatherize existing houses and set weatherization standards for both new houses and houses converting to electric space heating, as well as measures in the commercial building, government, industrial, and agricultural sectors, plus existing power system efficiency improvements. Plan Vol. I, Figure No. 10-1. Weatherization standards for residential buildings alone could create significant health problems due to an increase in indoor air pollutants such as carbon monoxide, particulates, formaldehyde, and radon gas which has been shown to be carcinogenic.

“[T]he present energy conservation program as it applies to building structures and, most important, homes involves making our habitable structures as

and such portions of the States of Nevada, Utah, and Wyoming that are within the Columbia River drainage basin. 16 U.S.C. § 839a(14)(A). Parts of California are also served by BPA. 16 U.S.C. § 839a(14)(B).

² Hydropower, geothermal, wind, solar, biomass, cogeneration, nonbiomass, coal, and nuclear. Plan Vol. I at Page Nos. 8-1 through 8-6.

'tight' as possible. There is no doubt that unless a reasonable and logical plan is developed, the deleterious health impacts of excessive home tightening will be enormous." Breysse, "The Health Cost of 'Tight' Homes," *Journal of the American Medical Association*, Vol. 245 at 267 (Jan. 16, 1981).

"What environmental scientists call 'sick buildings' pose a problem that cuts across, social and economic boundaries. They have been found everywhere from trailer parks in Texas to an Environmental Protection Agency office in Washington. 'We're just beginning to identify the problem of indoor air pollution,' says Hugh Kaufman, EPA hazardous waste expert and whistle-blower. 'But everywhere we look it is worse than we expected.'" Carey, Hager & Zuckerman, "Beware 'Sick-Building Syndrome,'" *Newsweek*, Jan. 7, 1985, at 58.³ See also Murphy, "The Colorless, Odorless Killer," *Time*, July 22, 1985, at 72. Cf. Bronson, "Some Like It Comfortable," *Forbes*, June 30, 1986, at 116.

³ "The key question, of course, is how serious a threat these indoor pollutants are to health. The clearest danger is posed by radon gas. Produced by the decay of uranium 238, a ubiquitous trace element in the earth's crust, inert radon does not bind to minerals and thus accumulates in the tiny air pockets in soil. From there, it is pulled into houses by pressure differences created by the rising of warm indoor air. Once inside, radon decays into other radioactive elements, such as polonium, that bind to dust and are inhaled into the lungs, where they can cause cancer.

"Extrapolating from rates of lung cancer in uranium miners, who are exposed to known amounts of radon and its products, researchers have calculated that 2,000 to 20,000 cases of the disease each year may be caused solely by indoor radon pollution. The geology of Maine and parts of Pennsylvania, Maryland, Oregon and Montana leads to particularly high radon risks. 'There are about a million homes with radon levels over the recommended standard,' says Anthony Nero of [Lawrence Berkeley Laboratories]. 'No other environmental risk, such as toxic-waste dumps, affects that many homes.'" Carey, Hager & Zuckerman at 59-60.

As the nationwide scope of the above quotations suggests, the danger is not limited to the people of the Pacific Northwest. The danger is increased by the potential for the Council's conservation standards to become models for building codes elsewhere in the United States, without an adequate analysis of the environmental impacts.⁴

Despite these significant environmental impacts the Ninth Circuit reached the curious conclusion that no environmental planning statutes applied to the Council or its Plan. The court found that the member states of the Council had not reserved rights to apply state environmental laws to the Council, and neither BPA nor the Council had taken a substantial federal action affecting the human environment which might trigger application of federal environmental laws. 786 F.2d at 1371. The impact of this ruling is to create a giant loophole in the environmental planning process. This was never intended by Congress. A clear, unencumbered reading of the Act "construed in a consistent manner" (16 U.S.C. § 839b), with Congress' unequivocal direction that the EIS process should be complied with "to the fullest extent possible" (42 U.S.C. § 4332) demonstrates that *both* federal

⁴ Also of concern to PLF is the potential liability of home builders when people using homes built to comply with the Council's standards become ill or die. To the knowledge of PLF, no appellate court has yet addressed the issue of builders' liability for injuries or illness caused by installing measures required by law. If a negligence standard were applied, and liability were based on fault, home builders would not be liable. But if a strict liability standard were applied, and liability were based on home buyers' reasonable expectations of safety, the nation's home builders could face billions of dollars of liability. At present, there is no way to tell which way the courts will go.

and state environmental laws apply to the actions of the Council.

**A. NEPA Mandates That an EIS Be Prepared
Assessing the Northwest Power Plan**

NEPA states that "all agencies of the Federal Government shall— . . . (C) include in . . . major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), an environmental impact statement. Adopting the Northwest Power Plan which directs the energy production strategy over the next 20 years for the Pacific Northwest is undoubtedly a major federal action significantly affecting the quality of the human environment. *See, supra*, at 4-6. There is no question that an EIS should have been prepared. The only question is whether the Council, if it is a federal agency under NEPA, or, if not, BPA which funded the Plan, was responsible to do it.

**1. The Northwest Power Planning Council
Is a Federal Agency for the Purposes
of NEPA and Should Have Filed an
Environmental Impact Statement**

The Council possesses *all* the indicia of a *federal* agency.

1. The Council and all its responsibilities are the product of *federal* legislation, 16 U.S.C. § 839, *et seq.*

2. The Plan was developed pursuant to 16 U.S.C. § 839b(d)(1) for the purpose of directing the BPA, a *federal* agency, in its energy acquisition.

3. The Act requires the Council to follow the *federal* laws applicable to the BPA in matters relating to contract formation, financial disclosure, advisory committees, and disclosure of information, 16 U.S.C. § 839b(a)(4).

4. Funding for the Council's electric energy Plan and its fish and wildlife program is provided by BPA, a *federal agency*, 16 U.S.C. § 839b(c)(10)(A).

5. Public hearings on establishment of the Plan are subject to Section 553 of the *federal* Administrative Procedure Act at a minimum, 16 U.S.C. § 839b(d)(1).

6. Even salaries of employees are limited by reference to the rate prescribed for *federal* officers at Step No. 1 of Level GS-18 of the general schedule.

In every respect, the Council acts like a federal agency.

The Council has argued, though, that 16 U.S.C. § 839b(2)(A) exempts it from complying with NEPA requirements imposed on federal agencies. The language is not without exception, however. It reads that the Council, "*except as otherwise provided in this chapter*, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law." (Emphasis added.) This exception to the Council's general exemption from having to comply with federal laws negates the Council's argument. The history behind this provision explains why. The purpose of the general exemption was not to eliminate federal environmental statutory requirements but to avoid a violation of the Appointments Clause of the United States Constitution, which requires federal officers to be appointed not by Congress or state governors but generally by the President.⁵ U.S. Const. Art. II, § 2, cl. 2.

⁵ Appointment of Council members by state governors violates the Appointments Clause. U.S. Const. Art. II, § 2, cl. 2. As Judge Beezer found in his dissent, by issuing the Plan, members of the Council exercise significant federal authority (continued)

On August 3, 1979, the Senate passed Senate Bill 885 (precursor of the Act) calling for five Council members, four appointed by governors. The fifth was the BPA administrator. By letter of October 25, 1979, the Justice Department issued an opinion letter that this appointment process for members was unconstitutional. *See* Addendum A to Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners Seattle Master Builders Association, *et al.* (PLF's Ninth Circuit Amicus Brief).

On March 19, 1980, one of the two House Committees to which S. 885 was referred recommended an amended version that called for 11 Council members. All were to be appointed by the Secretary of Energy upon the recommendation of the region's governors. House Committee on Interstate and Foreign Commerce, Rep. No. 976 (Part I), 96th Cong., 2d Sess. 28, *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5994 (House Commerce Report). This version of the bill did not raise any Appointments Clause problems because, unlike the Senate version of S. 885, Congress was conscious of the issue. Accordingly, Congress eliminated gubernatorial appointments and included language stating that the Council members were not to be deemed officers of the United States. House

pursuant to the laws of the United States. *See* Beezer dissent, 786 F.2d at 1375-76, for itemization of substantive actions Council takes under the Act which in part control the actions of the federal Bonneville Power Administration. "In sum, the Planning Act gives the Council the ability to produce significant substantive effects" on a federal agency and "[b]ecause the President did not appoint the members of the Council, the Council's actions are contrary to the Constitution and therefore void." *Id.* at 1376. *See* U.S. Const. Art. II, § 2, cl. 2 (Appointments Clause).

Commerce Report at 4. Simultaneously, language was included for the first time that the purposes of the Act were consistent with applicable provisions of environmental laws. *Id.* at 2.

As of September 16, 1980, the other House committee to be referred S. 885 recommended another version. It called for eight Council members with two each from Washington, Oregon, Idaho, and Montana to be directly appointed by their respective state governors. The purpose of the change, according to Representative Pat Williams, was to ensure regional control over regional power matters, and to provide a more meaningful check (*i.e.*, control) on the BPA administrator. House Committee on Interior and Insular Affairs, Rep. No. 976 (Part II), 96th Cong., 2d Sess. 70 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 6063 (House Interior Report). But giving state governors appointment authority of Council members created the inherent danger of violating the Appointments Clause, so Congress included a new provision in the Act. Besides reiterating that Council members were not officers of the United States and that the Act was to be consistent with environmental laws, the new version of S. 885 stated that if the Council were declared by the court to violate the Appointments Clause, the Council would be reconstituted as a federal agency with members once again appointed by the Secretary of Energy upon nomination of the governors. House Commerce Report at 41, 70-71.

By September 29, 1980, the two committee versions of S. 885 had been reconciled and the Commerce Committee version with minor changes eventually passed into law. Again, Council members and employees were not to be considered officers of the United States but, for the first

time, the critical exemption language earlier quoted and relied upon by the Council for a NEPA exemption was included with the modifying phrase "except as otherwise provided in this Act," H. 9866, 126 Cong. Rec. (daily ed., Sept. 29, 1980). Congress then specifically provided in the Act the *exception*—the "purposes [of the Act which included providing environmental quality] are . . . intended to be construed in a manner consistent with applicable environmental laws." *Id.* at H. 9865. Thus, Congress clearly sought to protect the environment yet avoid a violation of the Appointments Clause.

This course of legislative history undeniably shows that the exclusionary language of 16 U.S.C. § 839b(a)(2) (A) and (a)(3) was included only to try to protect the Council from an Appointments Clause challenge and, in fact, only after Congress became concerned about this problem, did it expressly include the critical operative language that the purposes of the Act are "intended to be construed in a manner consistent with applicable environmental laws," 16 U.S.C. § 839. Congress simply had no intention of exempting the Council from environmental considerations or NEPA.⁶ No other conclusion is reasonable, for to find otherwise creates the anomaly that Congress sought to protect environmental quality by

⁶ If Congress had wanted to exempt the Council from NEPA it would have done so expressly. For example, Congress exempted any action taken under the Clean Air Act stating that "[n]o action . . . shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." 15 U.S.C. § 793(c)(1). Likewise in the Regional Rail Reorganization Act, Congress stated: "The provisions of section 4332(2)(C) of Title 42 [EIS requirements] shall not apply with respect to any action taken under authority of this chapter" 45 U.S.C. § 791(c).

exempting the Council from those laws which require environmental scrutiny in decision making. Such a conclusion would be preposterous.

Under these circumstances where there is no clear congressional intent to exempt the Council, it must comply with the environmental impact statement requirement "to the fullest extent possible." 42 U.S.C. § 4332. As Congress stated:

" '[E]ach agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations *expressly* prohibits or makes full compliance with one of the directives impossible' " *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-88 (1976) (emphasis in original); 115 Cong. Rec. 39703 (1969) (House Conferences).

Unmistakably, the Act neither expressly prohibits nor makes compliance with EIS requirements impossible. To the contrary, the Act requires that it be "construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. The Council must be considered a federal agency *under NEPA* and should have filed an EIS.⁷

⁷ In respondents' brief before the Ninth Circuit, the Council argued that its Plan, especially Chapter 9, is functionally equivalent to an environmental impact statement. The argument is baseless. The only agency allowed such an exemption has been the Environmental Protection Agency because it is designed specifically to protect the environment. See *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). Only agencies "engaged primarily in the examination of environmental questions" qualify for an exemption. *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973). The Council is not an agency designed to protect the environment but is engaged primarily in planning for future energy needs. 16 U.S.C. § 839, et seq.

**2. If the Council Is Not a Federal Agency
for NEPA Purposes, BPA Is, and BPA Should
Have Prepared an EIS on the Council's
Plan Prior to Its Adoption**

BPA is required to fund the Council's preparation of and then implement the Northwest Power Plan. 16 U.S.C. § 839b(c)(10)(A). Assuming, *arguendo*, that the Council is not a federal agency for NEPA purposes, BPA's funding action sufficiently "federalizes" the Plan so that BPA was required to prepare an EIS prior to the Plan's adoption by the Council.

Federal funding of state or local programs has been found on numerous occasions to provide the federal nexus necessary to require the preparation of an EIS. The rationale was explained in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973):

"[T]here is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances, the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party—private or governmental—to take action affecting the environment." (Footnotes omitted.)

See Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (a federal law enforcement block grant used for the construction of a state medical and reception center for state prisoners,

sufficiently federalized the project to require an EIS); *see also Wilson v. Lynn*, 372 F. Supp. 934 (D. Mass. 1974); and *Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973) (privately developed housing was federalized for NEPA purposes by the receipt of financial assistance through federal housing subsidies). Consequently, even if the Council is not characterized as a federal agency, BPA's funding has federalized the Plan requiring an EIS prior to its implementation. BPA did not and has not prepared an EIS analyzing the environmental effects of the Plan, or all reasonable alternatives for providing the Pacific Northwest with the energy that will be needed over the next 20 years. This failure clearly violates NEPA.

3. The Ninth Circuit's Holding That Neither BPA nor the Council Has Taken a Substantial Federal Action Affecting the Human Environment Conflicts Dramatically with Other Circuits

In effect the Ninth Circuit ruled that the *Plan* does not constitute an action significant enough in its impacts on the human environment to require an EIS. 786 F.2d at 1371. It is hard to believe that a Plan which directs for the next 20 years how the Pacific Northwest region of the United States will meet its projected electric energy demand does not constitute an action which may significantly affect the human environment. The Plan calls for BPA to acquire 1,000 to 11,000 megawatts of electric energy resources. It calls for the development of conservation measures such as intensive weatherization, as an energy source with a projected acquisition figure of between 660 and 4,790 megawatts over a 20-year period. This finding of the Ninth Circuit is problematic in that other circuits require preparation of an EIS for actions

invoking impacts far less serious than the Plan's. *E.g.*, *Proetta v. Dent*, 484 F.2d at 1146 (federal approval of loan to finance portion of expansion of paper machinery company); *Hart v. Denver Urban Renewal Authority*, 551 F.2d 1178 (10th Cir. 1977) (loan and capital grant made by the federal Department of Housing and Urban Development to city urban renewal authority).

The Ninth Circuit has found that the 20-year regional power plan for the Pacific Northwest with its inherently significant energy conservation and resource development requirements does not constitute substantial enough action to call for an EIS. This finding puts this circuit out of step with every other circuit in the United States. For this reason alone the Supreme Court should grant the petition for writ of certiorari.

B. The Council Should Have Drafted a State EIS on the Plan. The Ninth Circuit's Contrary Ruling Improperly Encroaches on a State's Authority to Impose Its Own Environmental Review Standards

The Ninth Circuit's facile ruling has encroached upon the authority of Washington and Montana to adopt and enforce laws which are the proper subject matter of state legislation. The court has approved a model act, a model regional planning agency, and a model regional plan, all of which creates a model structure to avoid compliance with state and local decision-making procedures, and environmental laws. The effect of this approval is to invalidly sanction a governmental structure which unconstitutionally denies states the freedom to engage in legitimate state governmental activities. *See Garcia v.*

San Antonio Metro Transit Authority, — U.S. —, 105 S. Ct. 1005 (1985).

The court found that the Council, as a compact,⁸ need not comply with state EIS requirements. 786 F.2d at 1371. To reach this conclusion the court relied upon a completely incorrect analysis of *People v. City of South Lake Tahoe*, 466 F. Supp. 527 (E.D. Cal. 1978). It found that the states must “specifically reserve[] the right to impose regulations which [are] more stringent than those imposed by the compact organization itself,” and that “[n]either Washington nor Montana reserved such rights

⁸ Though for purposes of the applicability of environmental planning statutes it is nondeterminative, it is worth noting that the Council is not an interstate compact agency. As Judge Beezer noted the Council lacks several classic indicia of an interstate compact agency:

1. “All four states [represented on the Council] are free to repeal their statutes unilaterally.” 786 F.2d at 1372.

2. “[T]he creation of the Council [is authorized] on the consent of only three of the four states,” allowing the Council to take action “that could have substantive effects in a non-member state. If the Council [were] truly an interstate compact agency, that result would not be possible.” *Id.* (footnote omitted). (In fact, the Council’s actions do affect nonmember states already—Nevada, Utah, Wyoming, and California. 16 U.S.C. § 839(a)(14)(A) and (B)).

3. The four member states establish “policy and standards, not for each other, but for a federal agency with regional authority extending beyond those states.” 786 F.2d at 1372.

4. The Council lacks a state purpose—the purpose of the Council is simply to guide the actions of the BPA, a federal agency. *Id.* at 1373. Such characteristics plainly demonstrate that the Council is not an interstate compact agency.

in their statutes agreeing to establishment of the Council." 786 F.2d at 1371.⁹ Not only was the Court's application of the *City of South Lake Tahoe* principle analytically wrong,¹⁰ it totally missed the issue. That issue is whether or not state environmental laws were preempted by the Act. There is no question that Congress has the authority under the Commerce Clause of the Federal Constitution to legislate in the field of energy production. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981). But before such federal legislation can be found to preempt state law it must be found that either:

1. Congress clearly expressed its intent to preempt the state, *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 147-50 (1963);

2. the federal statutory and regulatory scheme is so pervasive that no room is left for state regulation, *Pennsylvania v. Nelson*, 350 U.S. 497, 502-04 (1956); or

⁹ The court did not question that the Council could have been required under state law to file an EIS for its energy plan. As amicus demonstrated in its brief before the Ninth Circuit, under Washington and Montana law the Council is a "state agency" and the Plan is a "major action affecting the quality of the environment" thus requiring an EIS under Washington and Montana law. Wash. Rev. Code Ann. § 43.31c.030(2) (1983); Mont. Rev. Code Ann. § 75-1-201(1)(b) (1983). See PLF's Ninth Circuit Amicus Brief at 36-40.

¹⁰ In *City of South Lake Tahoe* the court did not find an express reservation but an implied reservation by California of the right to require the Tahoe Regional Planning Agency, an interstate compact agency, to follow the California Environmental Quality Act. The Northwest Power Act embodies an analogous implied reservation by Washington and Montana to require the Council to follow their environmental laws. This is irrelevant, however, since the court's focus should have centered on whether or not these state environmental laws were preempted by the Act.

3. adherence to the state law may produce a result inconsistent with the stated purpose of the federal statute. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947). None of these criteria are met by the Act. The Act actually directs that its purposes are to be construed in a manner consistent with applicable environmental laws (16 U.S.C. § 839) and among those purposes is "providing environmental quality" (16 U.S.C. § 839(3)(C)). Thus, the lower court's imputed conclusion that state environmental laws are preempted by the Act constitutes judicial overreaching at its worst, and merits review by this Court.



CONCLUSION

The Ninth Circuit's decision finding the Council subject to neither federal nor state environmental disclosure statutes has created a frightening abyss in the field of environmental protection. The lower court has established the proposition, in conflict with other circuits, that significant actions affecting the environment need not follow the environmental protection planning process required by state and federal law if the actions are taken by an interstate compact agency. Already, bills have been introduced in Congress modeled after the Council which will further expand this planning loophole. See H.R. 3074, 99th Cong., 1st Sess. (1985) (proposed Regional Conservation and Electric Power Planning and Regulatory

Coordination Act of 1985). The Ninth Circuit's decision, allowed to stand, will turn this loophole into a schism of monumental proportions. A writ of certiorari should issue.

DATED: December, 1986.

Respectfully submitted,

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